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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1981

THE SCHOOL BOARD OF DADE COUNTY, FLORIDA,
a public corporation under the laws of
the State of Florida,

Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE ELEVENTH AMENDMENT BARS JURISDICTION OF A DIVERSITY ACTION AGAINST A SCHOOL BOARD ACTING NOT *QUA* SCHOOL BOARD, BUT AS THE *ALTER EGO* AND TRUSTEE OF THE STATE OF FLORIDA IN THE IMPLEMENTATION OF THE STATE PUBLIC SCHOOL CAPITAL IMPROVEMENTS CONSTRUCTION OF A SENIOR HIGH SCHOOL MEETING A STATE IDENTIFIED NEED, UNDER STATE CRITERIA AND CONTROL, USING STATE FUNDS GENERATED PURSUANT TO ARTICLE XII, SECTION 9(d) OF THE FLORIDA CONSTITUTION; WHERE SUCH STATE FUNDS ARE AVAILABLE TO PAY AND WILL BE USED TO PAY A JUDGMENT RENDERED IN THE CASE, OR IF NOT USED TO PAY SUCH JUDGMENT OR OTHER STATE AUTHORIZED CAPITAL IMPROVEMENT PURPOSES WILL BE RETURNED TO THE STATE?

II.

WHETHER IN A DIVERSITY ACTION AGAINST A SCHOOL BOARD AS THE *ALTER EGO* AND TRUSTEE OF THE STATE OF FLORIDA IN THE IMPLEMENTATION OF THE STATE PUBLIC SCHOOL CAPITAL IMPROVEMENTS CONSTRUCTION OF A SENIOR HIGH SCHOOL MEETING A STATE

IDENTIFIED NEED, UNDER STATE CRITERIA AND CONTROL, USING STATE FUNDS GENERATED PURSUANT TO ARTICLE XII, SECTION 9(d) OF THE FLORIDA CONSTITUTION AND SUCH STATE FUNDS ARE AVAILABLE TO PAY AND WILL BE USED TO PAY A JUDGMENT RENDERED IN THE CASE, OR IF NOT USED TO PAY SUCH JUDGMENT OR OTHER STATE AUTHORIZED CAPITAL IMPROVEMENT PURPOSES WILL BE RETURNED TO THE STATE, THE SCHOOL BOARD IS PROTECTED BY THE ELEVENTH AMENDMENT NOTWITHSTANDING THAT THE SCHOOL BOARD MEMBERS ARE NOT "STATE OFFICIALS" AND THAT THE SCHOOL BOARD *QUA* SCHOOL BOARD HAS INDEPENDENT RESOURCES SUFFICIENT TO PAY ANY JUDGMENT RENDERED IN THE CASE AND NO LAW PREVENTS THE SATISFACTION OF A JUDGMENT FROM SUCH INDEPENDENT RESOURCES?

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE SCHOOL BOARD OF DADE COUNTY, FLORIDA,
a public corporation under the laws of
the State of Florida,

Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, Eleventh Circuit, is reported at 666 F.2d 505.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS SOUGHT TO BE INVOKED

The opinion below of the Court of Appeals was entered on January 22, 1982 (A-6). The order denying rehearing was entered March 12, 1982 (A-15). This petition was timely filed. The jurisdiction of this Court is based on Title 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

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STATEMENT OF THE CASE

The School Board appears in this case not in its usual role as the operator of public schools (A-30), but rather appears as the *alter ego* and trustee (agent) of the State of Florida (A-29, 30) in the expenditure of State capital improvement funds provided by and subject to controls imposed by the State of Florida. (A-30-41.)

In this case, public school construction in Florida was State controlled and State funded. *All funds involved in this case and available to pay any judgment rendered are State funds* produced pursuant to a State bond issue authorized by Article XII, §9(d) of the Florida Constitution (A-19-29), the expenditure of which is controlled by the provisions of the section (A-30-41), State laws (A-42-63) and State Board of Education Rules. (A-71-78.)

This case involves the construction of the Miami Edison Senior High School replacement, State School EEE, in the City of Miami, Dade County, Florida. (A-19-22.) The contract for the construction was awarded pursuant to the public bidding laws to International Builders of Florida, (A-21). Travelers, as surety, posted the statutory performance and payment bond. (During the construction, International defaulted and Travelers completed the project. (Record-R-271.) All sums due under the contract and seven change orders have been paid from State funds. (A-20.) During the construction, delays occurred for which extensions of time to complete the contract were granted. Travelers claims $139,254.88 additional extended overhead costs due to the delays. (R-87-91.) The claim for these costs is the subject of this action.

Travelers filed a four-count complaint in the United States District Court for the Southern District of Florida, seeking to invoke jurisdiction under Title 28, U.S.C. §1332, alleging that the amount in controversy exceeds $10,000.00 and is between citizens of different states. The second count was dismissed, and was later reinstated. The first three counts are alternative causes of action for the extended overhead costs. (R-1-5, 291, 292.) The fourth count of the complaint was resolved by the parties and duly dismissed. (R-294.) The School Board has filed its answer and defenses. (R-192-196.) Discovery ensued and the parties entered into a pretrial stipulation. (R-270-289.) Thereafter, the School Board moved for summary judgment (A-17) and filed an affidavit in support of the motion. (A-19-29.) The District Court granted the summary judgment concluding that "under the singular facts of this case the Eleventh Amendment to the Constitution bars this Court from exercising subject matter jurisdiction of this case." (A-4, 5.) Travelers filed its appeal. (R-297.)

The decision and judgment of the Court of Appeals, Eleventh Circuit, entered January 22, 1982, ordered the summary judgment reversed and the cause remanded. (A-6-14.) The School Board suggested rehearing en banc, or in the alternative a rehearing. The suggestion and petition were denied by order entered March 12, 1982. (A-15).

The role of the State in this matter included: a state survey of educational facilities to identify the needs to be included in educational facilities construction program; approval of request to issue bonds; issuance of bonds; deposit of funds in the State Treasury; control of investment of funds; control of distribution of such

funds from the State Treasury to pay for the approved construction project; established criteria for project priorities; approved project priority list; authorized funding for approved priority projects; approved construction project plans and specifications, which conformed to the State Uniform Building Code for Public Educational Facilities Construction; required periodic inspections of construction by State certified or approved inspectors; and, before final payment was made for this construction project, a State inspection was conducted; and the State accepted the Miami Edison High School Project. (A-19-22.)

The prerogatives of the School Board in this matter were three in number. First, to determine whether to address the State identified highest priority construction needs from annual State revenues on a pay-as-you-go basis, or request the State to issue bonds secured by and to be paid from such revenues. In this instance, the School Board opted to request the State to issue bonds. (A-23-29.) Pursuant to the request, the State issued its Capital Outlay Bond Issue (COBI) Series 1974A as authorized by §9(d), Article XII of the Florida Constitution (A-30-41), the proceeds of which are the funds involved in this action. (A-20.) Second, the School Board, under State criteria and subject to State approval, selected the order in which the highest priority of State identified construction needs would be addressed. The Miami Edison Senior High School, State School EEE, was ranked second in order. (A-25, 26.) Third, the School Board, pursuant to the criteria established by law (S.287,055, Fla. Stat., A-63), selected the architects, whose plans and specifications were approved by the State. (A-21.)

From the proceeds of the bond issue, approximately $427,284.00 remains and is available to pay a judgment, if any is rendered in this case. (A-20.) If not so used, the funds must be used for the remaining highest priority needs ranked in lesser order in the resolution requesting the State to issue bonds, or the funds must be returned to the State. (A-27.)

The material facts relating to the jurisdiction issue are uncontroverted. (A-19-29.)

The panel decision sought to be reviewed notes the candid comment of counsel in argument before the District Court to the effect that the School Board does not represent that it could not "find" the $139,000.00 sum from its own resources. (A-8, 9), (R-Vol. 3, p. 9.) Counsel reaffirms the candid comment, and reasserts that any judgment rendered in this action for additional construction costs is the obligation of the State and *will be paid*, if necessary, *from State funds available for the purpose*. (A-20.)

This petition for writ of certiorari seeks to review the decision of the Court of Appeals, Eleventh Circuit, entered January 22, 1982 (A-6), rehearing denied March 2, 1982. (A-15.)

REASONS RELIED ON FOR GRANTING THE WRIT

1. The Decision Below Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

For the purpose of this petition, The School Board concedes that *qua* School Board it is not *per se* entitled to Eleventh Amendment protection.

Under the facts in this case, the role of the School Board is not *qua* School Board but rather as the *alter ego* and trustee (agent) of the State of Florida in the expenditure of State capital improvement funds provided by and subject to controls imposed by the State. As such, we contend that the conclusions reached in the decision rendered in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976) on the *per se* issue are inapposite. Applying the balancing test established in *Mt. Healthy, supra*, 429 U.S. at 280, 97 S.Ct. at 572, 573, to the facts of this case, the School Board would be entitled to Eleventh Amendment protection absent the distinctions created in the decision below.

The decision below decided two important questions of federal law which have not been, but should be, settled by this Court. The decision below created two novel distinctions in the law established by this Court in *Edelman v. Jordan*, 415 U.S 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

(1) On the last page of the decision below, the Court of Appeals states:

> "The first, and probably less significant, distinction here from Edelman is that the complaint does not allege the breach of a legal duty on the part of any state official. It charges breach of a legal duty by the Dade County Board of Education [*sic*], which, as we have seen, is not comprised of state officials." (A-14.)

The factual recitals are correct. However, the breach of duties charged originate in the architectural plans and specifications approved by the State. (A-77.) The charge is directed against the School Board, the named defendant, but the duty alleged to be breached is a duty and responsibility of the State. As previously noted, this public school construction was State controlled and State funded.

That the School Board is not composed of State officials should not be determinative of any issue. The availability of the Eleventh Amendment defense is predicated upon the relief sought, rather than the identity of the named defendant. In *Edelman* we are reminded that:

> "It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 374, 89 L.Ed.389 (1945), the Court said:

'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Id., at 464, 65 S.Ct., at 350.

Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 73, 66 S.Ct. 745, 90 L.Ed. 862 (1946)."

(415 U.S. at 663, 664, 94 S.Ct. at 1355, 1356)

When, as in this case, the action is in essence one for recovery of money from the state, the Eleventh Amendment applies. It is axiomatic that the state, and other governmental entities, act through their officers, agents, servants and employees. In this case the State acted through the School Board in the performance of State duties and responsibilities. That the School Board is charged with the breach of such legal duties does not alter the fact that the legal duties involved are legal duties of the State.

In a proper case the Eleventh Amendment defense is neither dependent upon the identity of the named defendant as a State official, nor upon the nature of the charges made in the complaint. The determinative issue is whether the relief sought is the recovery of money

from the State. In all matters relevant to this action, the School Board acted as the *alter ego* and Trustee (agent) of the State and, as such, is not thereby foreclosed from the protection of the Eleventh Amendment defense.

(2) The second distinction created by the decision below reads:

> "The more significant distinction is that *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against a state 'agency' must under all circumstances, be paid out of state funds. As we have already indicated, there is no contention, and no facts to support such a contention, if made, that there is any prohibition by state law or constitution that would prevent the county board of education from satisfying a judgment in this lawsuit out of county funds not in any way derived from the state of Florida. We, therefore, conclude that the appellee Board of Education of Dade County [*sic*] was not protected by the Eleventh Amendment." (A-14.)

There is no support in law for such an innovative distinction. While no law prohibits the School Board from paying any judgment from its own resources not derived from State funds, conversely, no law requires the School Board gratuitously to pay a State obligation from its own resources.

Nowhere in the law is a Court known to look to independent resources of a named defendant as being a material factor relating to the Eleventh Amendment

defense. The factor which determines the applicability of the Eleventh Amendment defense is whether the action is in essence one for the recovery of money from the State. Such is this case.

The facts in this case are uncontroverted. All *sums paid Travelers* under the contract here involved were *State funds*, *State funds* from the same source *are available* to pay any judgment in this case for additional construction costs, *and* such available *State funds will be used to pay any judgment* in this action. (A-20.)

There is no need to extrapolate from the evidentiary facts, as in *Edelman* and other cases therein cited, the conclusion that any judgment would of necessity be paid from State funds. In this action the fact is clear, and it is as certain as the sun rising in the East, that *any judgment rendered in this action will be paid from available State Funds.*

2. The Decision Below Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court.

For the reasons previously presented, the decision below, premised upon the decision of this Court in *Edelman*, *supra*, digressed from the perimeters of prior law to plow new furrows in a virgin field. It seeks to establish two new rules to foreclose the Eleventh Amendment defense; one predicated upon the identity of the named defendant and the charge made, as distinguished from the relief sought; and the other, predicated upon the independent resources of the named defendant being sufficient to pay the amount claimed. Each is a novel concept, and contrary to the teachings

of *Edelman*. *Edelman* has been misconstrued and inappropriately applied.

The decision below is in conflict with the decision of this Court in *Edelman*, *supra*.

3. State Law Which Confers Upon Florida School Boards The Right To "Sue And Be Sued" Does Not Amount To A Waiver Of The Eleventh Amendment Protection Against Suits In The United States Courts.

The decision below did not reach the question of waiver. (A-14.)

The Florida law granting school boards the right to "sue and be sued" (S.230.22(4), Fla. Stat., A-42) does only that and no more. This general waiver of sovereign immunity does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 101 S.Ct. 1032, at 1034 (1981), citing *Edelman*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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By /s/ THOMAS G. SPICER
THOMAS G. SPICER

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 79-2967-Civ-ALH

TRAVELERS INDEMNITY COMPANY,
Plaintiff,

vs.

THE SCHOOL BOARD OF DADE COUNTY, FLORIDA, etc.,

Defendant.

ORDER

This cause comes on before the Court upon the Motion For Summary Judgment of the Defendant, The School Board of Dade County, Florida. After argument of counsel and full consideration, the Court finds that there is no genuine material issue of fact to be tried on the issue of jurisdiction over the subject matter of this cause.

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. §1332 on the grounds of diversity of citizenship. The Defendant contends that the Eleventh Amendment to the Constitution bars the Court from exercising jurisdiction in this case. The claim in this case, framed in three counts, is for extended overhead expenses incurred by the Plaintiff as completing surety in the construction of Miami Edison Senior High School. The cost of the construction was paid by State of Forida funds produced from a capital outlay bond issue issued

pursuant to the provisions of Section 9(d) Article XII, of the Constitution of the State of Florida. Any judgment rendered in this case would be payable from the unexpended portion of these State Funds. Under the singular facts of this case the Eleventh Amendment to the Constitution of the United States bars this Court from exercising subject matter jurisdiction of this case. It is therefore,

ORDERED AND ADJUDGED that the motion for summary judgment be and the same is hereby granted, and it is further

ORDERED AND ADJUDGED that this action be and the same is hereby dismissed for lack of subject matter jurisdiction, that the Plaintiff, Travelers Indemnity Company take nothing by this action, and that the Defendant, The School Board of Dade County, Florida go hence without day.

DONE AND ORDERED at Miami, Florida this 22nd day of December, 1980

ALCEE L HASTINGS
DISTRICT JUDGE

TRAVELERS INDEMNITY COMPANY,
a Connecticut Corporation,
Plaintiff-Appellant,

v.

The SCHOOL BOARD OF DADE COUNTY, FLORIDA,
a public corporation under the laws
of the State of Florida,
Defendant-Appellee.

No. 81-5079.

United States Court of Appeals,
Eleventh Circuit.

Jan. 22, 1982.

* * * * *

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, HILL and JOHNSON, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from a summary judgment in which the trial court concluded that it lacked jurisdiction to entertain a diversity action because "under the singular facts of this case the Eleventh Amendment to the

Constitution of the United States bars this Court from exercising subject matter jurisdiction of this case."

The facts necessary to an understanding of this appeal are not in serious dispute. The county school board contracted for the building of a new school in Dade County. Under provisions of the Florida State Constitution and statutes the county board made its request to the state board for an allocation of funds to be raised by a bond issue for the purpose of building this school. Such an allocation was appropriately made. During the period of construction the general contractor defaulted and Travelers, which had executed a payment and performance bond for the general contractor, undertook to finish the construction work by the use of another contractor. This contractor was duly paid off for the contract price and seven extras after some delays in construction. Upon completion Travelers made a claim against the county board in the sum of $139,000, asserting that the board's architects had unduly delayed the completion of the contract while they undertook to make necessary changes. The board refused to pay and Travelers filed suit in the United States District Court on diversity grounds. Thereupon the county board filed its defensive pleadings and moved for a summary judgment on the ground that it was an arm of the state of Florida and the trial court lacked jurisdiction because of the protection of the Eleventh Amendment to the Constitution of the United States.

The board does not contend that it cannot, under any circumstances, be sued. Its claim for an Eleventh Amendment protection here is based upon the fact that the particular activity giving rise to the claim by the insurance company is one as to which the state of

Florida made the Board of Education its agent in contracting for, supervising the construction of, and the payment for, this particular school building. As is demonstrated by the record in the trial court at the time of the granting of the motion for summary judgment, the county board and the state board were proceeding on the assumption that the proceeds from the state bond issue in an amount sufficient to complete this contract would be available for that purpose and that in response to any judgment against the county board it would use these state funds to discharge the indebtedness. These circumstances, it is claimed, created in the county board of education a status comparable to that of the protected state official in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d. 662 (1974).

The appellant, on the other hand, contends that the test laid down by *Edelman* is whether such a judgment *must inevitably* be satisfied from state funds. It contends that nothing in the record establishes the fact that the judgment entered in this lawsuit could be satisfied *only* out of the state funds which were made available to the defendant board for that purpose.

We are satisfied that the record discloses that the county board had substantial other funds which were available for construction purposes without reference to the particular allotment of the state Capital Outlay Bond issue proceeds. Affidavits of the Dade board officials established this fact. Moreover, the county board counsel in his argument to the trial court made a binding concession to this effect. He said: "Now, being very candid, Judge, I am not trying to come here and say that this [Dade County] School Board's seven hundred

million dollar budget couldn't find the $139,000, that is not what I am saying. I am saying that it is not our responsibility, that is not what the state program contemplates. This is a cost of construction. The question is who pays that cost." Thus, it is clear that the issue before us presents the following question: If a subordinate political entity of a state which is not normally considered a part of the state for Eleventh Amendment purposes has property and means of its own with which it can respond to a judgment, does it, nevertheless, have Eleventh Amendment protection if, in fact, the suit against it arises out of a contract for the completion of which the state has furnished funds?

We begin with the basic proposition that ordinarily boards of education in Florida are not *qua* boards of education protected from suit by the Eleventh Amendment. In *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976), a case involving a Florida county school board,[1] the Court of Appeals for the Fifth Circuit said:

> Appellants further contend that Campbell's claims for back pay and attorney's fees are barred by the Eleventh Amendment in accordance with *Edelman v. Jordan* (cites omitted). The District Court apparently accepted this argument, at least with respect to the back pay issue, since its denial of back pay was predicated on *Edelman* concerns. As the Supreme Court in *Edelman* was careful to note however, a

[1]This Court looks to the decisions of the Court of Appeals for the Fifth Circuit as binding precedent unless and until overruled or modified by this Court en banc. *Bonner v. City of Pritchard, Alabama, et al.*, 661 F.2d 1206 (5th Cir. 1981).

County does not occupy the same position as the State for the purposes of the Eleventh Amendment. . . . [W]hile County action is generally State action for the purposes of the Fourteenth Amendment, a County defendant is not necessarily a State Defendant for the purposes of the Eleventh Amendment. 415 U.S. at 667 n. 12, 94 S.Ct. at 1358 n. 12. Our post-*Edelman* cases involving actions for retrospective monetary relief against County School Boards and similar entities have held that the Eleventh Amendment does not bar it from such award so long as the entities sued are locally controlled, essentially local in character, and funds to defray the awards would not be derived primarily from the State Treasury. (Cites omitted.) Our analysis of the nature of Florida School Boards in the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment.

534 F.2d 650 at 655-656.

What the Court said in the *Gadsden County* case was consistent with the Supreme Court's opinion in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), where the Court said:

. . . Petitioner is but one of many local school boards within the state of Ohio. It is subject to some guidance from the state board of education, Ohio Rev. Code Ann. §3301.07 (p. 1972 & supp. 1975), and receives a significant amount of money from the state. Ohio Rev.Code Ann. §3317 (p. 1972

& supp. 1975). But local school boards have extensive powers to issue bonds, Ohio Rev.Code Ann. §133.27 (p. 1069), and to levy taxes within certain restrictions of state law. Ohio Rev. Code Ann. §§5705.02, 5705.03, 5705.192, 5705.194 (p. 1973 & supp. 1975). On balance the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the state. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

429 U.S. at 280, 97 S.Ct. at 572-73. Thus, it is clear that there is nothing that inheres in the nature of a county school board in Florida that would entitle it *per se* to Eleventh Amendment protection.

We now turn to the question whether in the special circumstances existing with respect to this particular contract the character of the county school board is metamorphosed in such a manner as to be an arm of the state. Appellees assert that this occurs because the particular funds provided for the construction contract here involved were provided by the state of Florida. They would be looked to, in the opinion expressed by the affiant for the board, for the satisfaction of a judgment against it.

We think *Edelman* requires that we give a negative answer to this inquiry. In that case the suit was filed by persons entitled to certain benefits which were administered by the Illinois Department of Public Aid. It was their complaint that Illinois officials, operating under state regulations, were improperly authorizing grants to commence only with the month in which an application was approved and not including prior eligibility

months for which an applicant was entitled to aid under federal law. The complaint sought an injunction, together with a judgment for benefits alleged to be past due. The district court and the Court of Appeals for the Seventh Circuit determined that the state officials were not protected by the Eleventh Amendment in such a suit. The Court, commenting on *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), noted that the relief awarded in *Ex Parte Young* was prospective only. The opinion then stated:

> But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing. *These funds will obviously not be paid out of the pocket of petitioner Edelman.* Addressing himself to a similar situation in *Rothstein v. Wyman*, 467 F.2d 226 (CA2 1972), cert. denied, 411 U.S. 921 [93 S.Ct. 1552, 36 L.Ed.2d 315] (1973), Judge McGowan observed for the court:
>
> > *It is not pretended that these payments are to come from the personal resources of these appellants.* Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
> >
> > It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the program he administers. *It is quite another thing to order the Commissioner to use state*

> *funds* to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force. 467 F.2d at 236-237 (footnotes omitted).

We agree with Judge McGowan's observations. *The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois*, and thus the award resembles far more closely the monetary award against the State itself. *Ford Motor Co. v. Department of Treasury, supra*, [323 U.S. 549, 65 S.Ct. 347, 89 L.Ed. 389] than it does the prospective injunctive relief awarded in *Ex Parte Young*.

415 U.S. at 664, 94 S.Ct. at 1356 (emphasis added.)

After noting that the injunction issued in *Ex Parte Young* and in the subsequent cases of *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) and *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1969), were "not totally without effect on the state's revenues," the Court said:

> . . . while the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damage against a state. *It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action.* It is measured in terms of

> a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

415 U.S. at 668, 94 S.Ct. at 1358 (emphasis added.)

The first, and probably less significant, distinction here from *Edelman* is that the complaint does not allege the breach of a legal duty on the part of any state official. It charges breach of a legal duty by the Dade County Board of Education, which, as we have seen, is not comprised of state officials.

[1, 2] The more significant distinction is that *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state "agency" *must* under all circumstances, be paid out of the state funds. As we have already indicated, there is no contention, and no facts to support such a contention, if made, that there is any prohibition by state law or constitution that would prevent the county board of education from satisfying a judgment in this lawsuit out of county funds not in any way derived from the state of Florida. We, therefore, conclude that the appellee Board of Education of Dade County was not protected by the Eleventh Amendment.

We do not reach the question whether state law which confers upon the county boards of education the right to "sue and be sued" would amount to a waiver of the Eleventh Amendment protection against suits in the United States courts.

The judgment is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

[FILED MAR 12 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5079

TRAVELERS INDEMNITY COMPANY,
a Connecticut Corporation,
Plaintiff-Appellant,

versus

THE SCHOOL BOARD OF DADE COUNTY,
FLORIDA, a public corporation
under the laws of the State of Florida
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion January 22, 11 Cir., 1982, ____ F.2d ____).

Before TUTTLE, HILL and JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C Hill

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA

CIVIL DIVISION

CASE NO. 79-2967-Civ-CA

TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Plaintiff,

v.

THE SCHOOL BOARD OF DADE COUNTY,
FLORIDA, a public corporation under the laws of
the State of Florida,

Defendant.

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, The School Board of Dade County, Florida, and moves the Court to enter summary judgment in favor of the Defendant for that there is no genuine material issue of fact to be tried on the issue of jurisdiction over the subject matter of this cause, and from the affidavit filed herewith, other affidavits filed or to be filed, and depositions, if any

filed or to be filed, the Defendant is entitled to judgment as a matter of law.

FRANK A. HOWARD, JR.
Attorney for Defendant
Room 200
1410 N. E. Second Avenue
Miami, Florida 33132
Telephone (305) 350-3123

By /s/ Thomas G. Spicer
THOMAS G. SPICER
Assistant School Board Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 79-2967-Civ-ALH

TRAVELERS INDEMNITY COMPANY,
Plaintiff,

vs.

THE SCHOOL BOARD OF DADE COUNTY, FLORIDA, etc.,
Defendant.

AFFIDAVIT

STATE OF FLORIDA)
(SS
COUNTY OF DADE)

Personally appeared before me the undersigned authority, DR. PAUL J. PHILLIPS, personally known to me, who first being duly sworn deposes and says that:

1. He is the Director of the Department of Construction for the Defendant, The School Board of Dade County, Florida, and has personal knowledge of the matters hereinafter appearing in this affidavit.

2. All Dade County school administrative matters relating to the construction of Miami Edison Senior High School replacement, State School EEE, Project No. X-0154, are the responsibility of the Department of Construction and under his direct supervision and control.

3. All costs of the Miami Edison Senior High School construction project, being Project No. X-0154; including Project Architect's fees for design and supervision in the sum of $298,857.00; Consulting Architect's fees for services rendered in the sum of $61,620.00; costs of construction paid to International Builders of Florida, Inc., as Contractor, and Travelers Indemnity Company, as surety completing the construction under the contract involved in this case, in the sum of $6,216,143.01; cost of construction for work deleted from the aforesaid contract and redesigned performed by P. J. Constructors, Inc., in the sum of $32,250.00; among others; were paid from Capital Outlay Bond Issue, Series 1974A, funds provided for such purpose pursuant to Section 9(d), Article XII, of the Constitution of the State of Florida.

4. Attached hereto is a true and correct copy of the resolution of The School Board of Dade County, Florida, requesting the Board of Education of Florida to issue the aforesaid Capital Outlay Bonds for the purpose, among others, of financing the construction of Miami Edison Senior High School, therein identified as Project No. 22.

5. In the event a money judgment is rendered in this case, its effect will be to increase the cost of the Miami Edison Senior High School construction project and would be paid from the capital outlay funds received pursuant to the Capital Outlay Bond Issue, Series 1974A, of which approximately $427,284.00 presently remains to be expended for the purposes identified in the attached resolution. No other funding source exists or is available for the purpose of paying a judgment rendered in this case.

6. The State of Florida, through the Legislature, the Board of Education and the Department of Education, control or approve each stage of the expenditure of capital outlay funds provided pursuant to Section 9(d), Article XII of the Constitution of the State of Florida. Chapter 235, Florida Statutes and Chapter 6A-2, and particularly Part IV thereof being 6A-2.200 through 6A-2.212 of the Florida Administrative Code, establish the criteria for each stage of the process, which for the Miami Edison Senior High School project included a state survey of educational facilities to identify the needs to be included in educational facilities construction program, approval of such program, approval of the annual capital outlay budget based upon and in harmony with such approved program, approval of request to issue bonds, issuance of bonds, deposit of funds in the State Treasury, control of investment of funds, control of distribution of such funds from the State Treasury to pay for the approved construction project, established criteria for project priorities, approved project priority list, authorized funding for approved priority projects, approved construction project plans and specifications, which conformed to the State Uniform Building Code for Public Educational Facilities Construction, required periodic inspections of construction by State certified or approved inspectors, and, before final payment was made for this construction project, a State inspection was conducted and the State accepted the Miami Edison High School project.

7. The construction contract involved in this case was awarded pursuant to the public bidding requirements of the State by The School Board of Dade County, Florida, to International Builders of Florida, Inc., a Florida corporation. Both the agenda item recommending

the award and the minutes of the official public meeting at which the contract was awarded, true and correct copies of which are hereto attached, indicate the source of funds for payment of the contract costs as being Capital Outlay Bond Issue (COBI) Series 1974A, being funds produced by the State of Florida issuing bonds secured by the first proceeds of the State of Florida motor vehicle license taxes as provided by Section 9(d), Article XII of the Constitution of the State of Florida. It is estimated that for the fiscal year July 1, 1980 through June 30, 1981, the instructional units in the school district of Dade County, Florida, will generate approximately $9,814,812.00, under Section 9(d), Article XII of the Constitution of the State of Florida, of that sum all are encumbered and pledged to pay the State of Florida administrative costs, principal and debt service of various series of Capital Outlay Bond Issues, except the sum of approximately $2,851,497.00.

Further affiant sayeth not.

/s/ Paul J. Phillips
DR. PAUL J. PHILLIPS

SWORN TO and subscribed before me this 14th day of November, 1980.

/s/ Paula J. Richardson
Notary Public, State of Florida

My commission expires:
Notary Public State of Florida at Large.
My Commission Expires April 27, 1983.

A RESOLUTION OF THE SCHOOL BOARD OF DADE COUNTY, FLORIDA, REQUESTING THE ISSUANCE BY THE STATE BOARD OF EDUCATION OF FLORIDA OF $48,850,000 CAPITAL OUTLAY BONDS FOR AND ON BEHALF OF SUCH BOARD FOR THE PURCHASES HEREINAFTER STATED.

WHEREAS, pursuant to Article XII, Section 9, Subsection (d) of the Florida Constitution of 1968, approved at the general election of November, 1968, as amended at the general election of November, 1972 (herein collectively referred to as "School Capital Outlay Amendment"), the State Board of Education of Florida is authorized to issue bonds payable solely as to both principal and interest from the funds provided for in said School Capital Outlay Amendment for the purpose of financing capital outlay projects for school purposes in the manner provided therein upon the application of The School Board of any School District and of the Board of Trustees of any Junior College District in the State of Florida; and

WHEREAS, this School Board of Dade County, Florida, deems it necessary and essential that $48,850,000 of such bonds be issued by said State Board of Education in order to finance capital outlay projects in the School District of Dade County, Florida, (hereinafter called "District"), as hereinafter set forth; now, therefore,

BE IT RESOLVED BY THE SCHOOL BOARD OF Dade COUNTY, FLORIDA, (hereinafter called "Board"):

SECTION 1. It is hereby found, declared and determined by this Board as follows, that:

(a) A survey has heretofore been made and is now in effect, under regulations prescribed by the State Board of Education, of the capital outlay school needs of said District which said survey has been approved as required by said State Board of Education, and is now on file in the office of the Secretary of this Board and in the office of the State Board of Education at Tallahassee, Florida, which said survey is by reference made a part of this resolution as fully and to the same extent as if incorporated verbally herein.

(b) It is essential and necessary in order to maintain the public schools in said District for said State Board of Education to issue $48,850,000 Capital Outlay Bonds for and on behalf of the Board in order to finance the cost of acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating or repairing of the following capital outlay projects for school purposes in said District, described and listed as follows in order of priority of need as approved by the State Board of Education:

Project No.	Name of School Center, or Description of Location	Description of Project and List of Facilities Included
21	State School Senior High "DDD" State School Page 115 (Old XIX & 275)	New Construction 38 General Classrooms; 10 Science Labs; 2 Science Labs (Resource Unit); Closed Circuit TV area; 5 Industrial Arts Shops; Mechanical Drawing Room; Art Rooms; Band Suite; Vocal Music Suite; General Music Room; Language Lab (Resource Unit); Home-Making Suite; Large Group Instruction Room; Gymnasium (including shower and locker rooms); DCT and DE Room; Business Education Suite; Auditorium; Library; Food Service; Administrative Suite; Guidance Suite; Toilet Rooms; Storage, Mechanical, Heating, Cooling; Book and Central Materials, Reading Suite; Custodial Space.

Project No.	Name of School Center, or Description of Location	Description of Project and List of Facilities Included
22	Miami Edison Senior High Replacement S/S "EEE" Page 68 (Old No. 97)	New Construction 25 General Classrooms; 6 Science Labs; 2 Science Labs (Resource Unit); Closed Circuit TV Area; 3 Industrial Arts Shops; Mechanical Drawing Room; Band Suite; 2 Art Rooms; Vocal Music Suite; Large Group Instruction Room; Gymnasium (including Shower and Locker Rooms); DCT and DE Room; Business Education Suite; Auditorium; Exceptional Child Room; Library; Food Service; Administrative Suite; Guidance Suite; Toilet Rooms; Storage; and Mechanical.

[LESSER PRIORITY PROJECTS OMITTED]

(c) The capital outlay projects described above shall have priority in the financing thereof in the order stated above, the same being the order of priority of needs of said capital outlay projects as shown in said survey heretofore referred to, and there being no other capital outlay projects for said District, as shown on said survey, having a higher order or priority of needs for said District.

SECTION 2. This Board does hereby request said State Board of Education to issue Capital Outlay Bonds for and on behalf of the Board pursuant to said School Capital Outlay Amendment, for the purpose of financing the cost of the capital outlay projects described in Section 1(b) hereof. Said Capital Outlay Bonds shall

have such date or dates of issue and date or dates of maturity, shall have such provisions for redemption prior to maturity, with or without premium, such place or places of payment, and such other details as said State Board of Education shall in its discretion determine, and said Capital Outlay Bonds shall be sold by said State Board of Education in the manner provided by said School Capital Outlay Amendment and the proceeds thereof shall be applied to the financing of the capital outlay projects described in Section 1(b) hereof in the manner required by and as provided in the rules and regulations of the State Board of Education now existing or hereafter adopted.

SECTION 3. This Board does hereby agree and consent that it will fully comply with and abide by all rules, regulations and orders of said State Board of Education now in existence or hereafter at any time made relative to the financing of said capital outlay projects, the application of the proceeds of said Capital Outlay Bonds, and the acquiring, building constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating or repairing of said capital outlay projects, and all other matters relating thereto.

SECTION 4. In the event any balance of the proceeds of said Capital Outlay Bonds shall remain after the completion of the capital outlay projects described in Section 1(b), and after the payment or reservation of sufficient funds for the payment of all cost thereof then such unexpended balance of such proceeds shall in the discretion of said State Board of Education, be deposited in the Reserve Account in the Sinking Fund for the payment of principal and interest

on said Capital Outlay Bonds, or for the cost of other capital outlay projects described in said survey and for no other purpose.

SECTION 5. In the event that the priority of needs of capital outlay projects of the District as shown on said survey shall be hereafter changed upon the request of this Board and with approval as required by the said State Board of Education, then the proceeds of such Capital Outlay Bonds may be used for the capital outlay projects having the highest priority of needs instead of the capital outlay projects described in Section 1(b) hereof, in the manner provided in said School Capital Outlay Amendment and under such rules and regulations now existing or hereafter made by said State Board of Education.

SECTION 6. The Secretary of this Board be and he is hereby directed to forthwith file a certified copy of this resolution with said State Board of Education and the proper officials of this Board be and they are hereby authorized and directed to furnish any and all data, information, records or other documents or papers as shall be required or requested by said State Board of Education in connection with this resolution and the financing of the capital outlay projects described in this resolution.

SECTION 7. This resolution shall become effective July 1, 1973.

STATE OF FLORIDA

COUNTY OF DADE

I, the undersigned Secretary of The School Board of Dade County, Florida, do hereby certify that the foregoing constitutes a true and correct copy of a resolution duly adopted and entered in the minutes of said Board at a meeting held on the 20th day of February, 1974.

IN WITNESS WHEREOF, I have hereunto set my signature and official seal this 20th day of February, 1974, A.D.

Signed: [illegible]
Secretary of the School Board
of Dade County, Florida

(SEAL)

/s/ [illegible]
Chairman of the Board

* * * * *

CONSTITUTION OF THE STATE OF FLORIDA
ARTICLE IX
EDUCATION

* * * * *

SECTION 1. System of public education. —Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

SECTION 2. State board of education.—The governor and the members of the cabinet shall constitute a state board of education, which shall be a body corporate and have such supervision of the system of public education as is provided by law.

* * * * *

SECTION 4. School districts; school boards.—

(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, as provided by law.

(b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

* * * * *

ARTICLE XII

SCHEDULE

SECTION 9. Bonds.—

* * * * *

(d) SCHOOL BONDS.

(1) Article XII, Section 9, Subsection (d) of this constitution, as amended, (which, by reference, adopted Article XII, Section 18, of the Constitution of 1885, as amended) as the same existed immediately before the effective date of this amendment is adopted by this reference as part of this amendment as completely as though incorporated herein verbatim, for the purpose of providing that after the effective date of this amendment the first proceeds of the revenues derived from the licensing of motor vehicles as referred to therein shall be distributed annually among the several counties in the ratio of the number of instruction units in each county, the same being coterminus with the school district of each county as provided in Article IX, Section 4, Subsection (a) of this constitution, in each year computed as provided therein to the extent necessary to comply with all obligations to or for the benefit of holders of bonds or motor vehicle tax anticipation certificates issued before the effective date of this amendment or any refundings thereof which are secured by any portion of such revenues derived from the licensing of motor vehicles.

(2) No funds anticipated to be distributed annually among the several counties under the formula stated in Article XII, Section 9, Subsection (d) of this constitution, as amended, as the same existed immediately before the effective date of this amendment shall be pledged as security for any obligations hereafter issued or entered into, except that any outstanding obligations previously issued pledging such funds may be refunded at a lower net average interest cost rate by the issuance of refunding bonds maturing not later than the obligations refunded,

secured by the same revenues and any other security authorized in paragraph (13) of this subsection (d).

(3) Subject to the requirements of paragraph (1) of this subsection (d) beginning July 1, 1973 and for thirty-five years thereafter, the first proceeds of the revenues derived from the licensing of motor vehicles to the extent necessary to comply with the provisions of this amendment, shall, as collected, be placed monthly in the school district and junior college district capital outlay and debt service fund in the state treasury and used only as provided in this amendment. Such revenue shall be distributed annually among the several school districts and junior college districts in the ratio of the number of instruction units in each school district or junior college district in each year computed as provided herein. The amount of the first revenues derived from the state motor vehicle license taxes to be so set aside in each year and distributed as provided herein shall be an amount equal to the aggregate to the product of six hundred dollars ($600) multiplied by the total number of instruction units in all the school districts of Florida for the school fiscal year 1967-68, plus an amount equal in the aggregate to the product of eight hundred dollars ($800) multiplied by the total number of instruction units in all the school districts of Florida for the school fiscal year 1972-73 and for each school fiscal year thereafter which is in excess of the total number of such instruction units in all the school districts of Florida for the school fiscal year 1967-68, such excess units being designated "growth units." The amount of the first revenues derived from the state motor vehicle license taxes to be so set aside in each year and distributed as provided herein shall additionally be an amount equal in the aggregate to the product of four hundred dollars ($400) multiplied

by the total number of instruction units in all junior college districts of Florida. The number of instruction units in each school district or junior college district in each year for the purposes of this amendment shall be the greater of (1) the number of instruction units in each school district for the school fiscal year 1967-68 or junior college district for the school fiscal year 1968-69 computed in the manner heretofore provided by general law, or (2) the number of instruction units in such school district, including growth units, or junior college district for the school fiscal year computed in the manner heretofore or hereafter provided by general law and approved by the state board of education (hereinafter called the state board), or (3) the number of instruction units in each school district, including growth units, or junior college district on behalf of which the state board has issued bonds or motor vehicle tax anticipation certificates under this amendment which will produce sufficient revenues under this amendment to equal one and twelve-hundredths (1.12) times the aggregate amount of principal of and interest on all bonds or motor vehicle tax anticipation certificates issued under this amendment which will mature and become due in such year, computed in the manner heretofore or hereafter provided by general law and approved by the state board.

(4) Such funds so distributed shall be administered by the state board as now created and constituted by Section 2 of Article IX of the State Constitution as revised in 1968, or by such other instrumentality of the state which shall hereafter succeed by law to the powers, duties and functions of the state board, including the powers, duties and functions of the state board provided in this amendment. For the purposes of this amendment, said state board shall be a body corporate and shall

have all the powers provided in this amendment in addition to all other constitutional and statutory powers related to the purposes of this amendment heretofore or hereafter conferred upon said state board.

(5) The state board shall, in addition to its other constitutional and statutory powers, have the management, control and supervision of the proceeds of the first part of the revenues derived from the licensing of motor vehicles provided for in this subsection (d). The state board shall also have power, for the purpose of obtaining funds for the use of any school board of any school district or board of trustees of any junior college district in acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects for school purposes to issue bonds or motor vehicle tax anticipation certificates, and also to issue such bonds or motor vehicle tax anticipation certificates to pay, fund or refund any bonds or motor vehicle tax anticipation certificates theretofore issued by said state board. All such bonds or motor vehicle tax anticipation certificates shall bear interest at not exceeding five per centum per annum, or such higher interest rate as may be authorized by statute heretofore or hereafter passed by a three-fifths (3/5) vote of each house of the legislature. All such bonds shall mature serially in annual installments commencing not more than three (3) years from the date of issuance thereof and ending not later than thirty (30) years from the date of issuance, or July 1, 2007, A.D., whichever is earlier. All such motor vehicle tax anticipation certificates shall mature prior to July 1, 2007, A.D. The state board shall have power to determine all other details of said bonds or motor vehicle tax anticipation certificates

and to sell at public sale after public advertisement, or exchange said bonds or motor vehicle tax anticipation certificates, upon such terms and conditions as the state board shall provide.

(6) The state board shall also have power to pledge for the payment of the principal of and interest on such bonds or motor vehicle tax anticipation certificates, including refunding bonds or refunding motor vehicle tax anticipation certificates, all or any part from the anticipated revenues to be derived from the licensing of motor vehicles provided for in this amendment and to enter into any covenants and other agreements with the holders of such bonds or motor vehicle tax anticipation certificates at the time of the issuance thereof concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

(7) No such bonds or motor vehicle tax anticipation certificates shall ever be issued by the state board until the adoption of a resolution requesting the issuance thereof by the school board of the school district or board of trustees of the junior college district on behalf of which the obligations are to be issued. The state board of education shall limit the amount of such bonds or motor vehicle tax anticipation certificates which can be issued on behalf of any school district or junior college district to ninety percent (90%) of the amount which it determines can be serviced by the revenue accruing to the school district or junior college district under the provisions of this amendment, and such determination shall be conclusive. All such bonds or

motor vehicle tax anticipation certificates shall be issued in the name of the state board of education but shall be issued for and on behalf of the school board of the school district or board of trustees of the junior college district requesting the issuance thereof, and no election or approval of qualified electors shall be required for the issuance thereof.

(8) The state board shall in each year use the funds distributable pursuant to this amendment to the credit of each school district or junior college district only in the following manner and in order of priority:

a. To comply with the requirements of paragraph (1) of this subsection (d).

b. To pay all amounts of principal and interest maturing in such year on any bonds or motor vehicle tax anticipation certificates issued under the authority hereof, including refunding bonds or motor vehicle tax anticipation certificates, issued on behalf of the school board of such school district or board of trustees of such junior college district; subject, however, to any covenants or agreements made by the state board concerning the rights between holders of different issues of such bonds or motor vehicle tax anticipation certificates, as herein authorized.

c. To establish and maintain a sinking fund or funds to meet future requirements for debt service or reserves therefor, on bonds or motor vehicle tax anticipation certificates issued on behalf of the school board of such school district or board of trustees of such junior college district under the authority hereof, whenever the state board shall deem it necessary or

advisable, and in such amounts and under such terms and conditions as the state board shall in its discretion determine.

d. To distribute annually to the several school boards of the school districts or the boards of trustees of the junior college districts for use in payment of debt service on bonds heretofore or hereafter issued by any such school boards of the school districts or boards of trustees of the junior college districts where the proceeds of the bonds were used, or are to be used, in the acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects in such school districts or junior college districts and which capital outlay projects have been approved by the school board of the school district or board of trustees of the junior college district, pursuant to the most recent survey or surveys conducted under regulations prescribed by the state board to determine the capital outlay needs of the school district or junior college district. The state board shall have power at the time of issuance of any bonds by any school board of any school district or board of trustees of any junior college district to covenant and agree with such school board or board of trustees as to the rank and priority of payments to be made for different issues of bonds under this subparagraph d., and may further agree that any amounts to be distributed under this subparagraph d. may be pledged for the debt service on bonds issued by any school board of any school district or board of trustees of any junior college district and for the rank and priority of such pledge. Any such covenants or agreements of the state board may be

enforced by any holders of such bonds in any court of competent jurisdiction.

e. To distribute annually to the several school boards of the school districts or boards of trustees of the junior college districts for the payment of the cost of acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects for school purposes in such school district or junior college district as shall be requested by resolution of the school board of the school district or board of trustees of the junior college district.

f. When all major capital outlay needs of a school district or junior college district have been met as determined by the state board, on the basis of a survey made pursuant to regulations of the state board and approved by the state board, all such funds remaining shall be distributed annually and used for such school purposes in such school district or junior college district as the school board of the school district or board of trustees of the junior college district shall determine, or as may be provided by general law.

(9) Capital outlay projects of a school district or junior college district shall be eligible to participate in the funds accruing under this amendment and derived from the proceeds of bonds and motor vehicle tax anticipation certificates and from the motor vehicle license taxes, only in the order of priority of needs, as shown by a survey or surveys conducted in the school district or junior college district under regulations prescribed by the state board, to determine the capital outlay needs of the school district or junior college

district and approved by the state board; provided that the priority of such projects may be changed from time to time upon the request of the school board of the school district or board of trustees of the junior college district and with the approval of the state board; and provided further, that this paragraph (9) shall not in any manner affect any covenant, agreement or pledge made by the state board in the issuance by said state board of any bonds or motor vehicle tax anticipation certificates, or in connection with the issuance of any bonds of any school board of any school district, or board of trustees of any junior college district.

(10) The state board may invest any sinking fund or funds created pursuant to this amendment in direct obligations of the United States of America or in the bonds or motor vehicle tax anticipation certificates, issued by the state board on behalf of the school board of any school district or board of trustees of any junior college district.

(11) The state board shall have power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this amendment of full force and operating effect. The legislature shall not reduce the levies of said motor vehicle license taxes during the life of this amendment to any degree which will fail to provide the full amount necessary to comply with the provisions of this amendment and pay the necessary expenses of administering the laws relating to the licensing of motor vehicles, and shall not enact any law having the effect of withdrawing the proceeds of such motor vehicle license taxes from the operation of this amendment and shall not enact any law impairing

or materially altering the rights of the holders of any bonds or motor vehicle tax anticipation certificates issued pursuant to this amendment or impairing or altering any covenant or agreement of the state board, as provided in such bonds or motor vehicle tax anticipation certificates.

(12) The state board shall have power to appoint such persons and fix their compensation for the administration of the provisions of this amendment as it shall deem necesssary, and the expenses of the state board in administering the provisions of this amendment shall be prorated among the various school districts and junior college districts and paid out of the proceeds of the bonds or motor vehicle tax anticipation certificates or from the funds distributable to each school district or junior college district on the same basis as such motor vehicle license taxes are distributable to the various school districts or junior college districts under the provisions of this amendment. Interest or profit on sinking fund investments shall accrue to the school districts or junior college districts in proportion to their respective equities in the sinking fund or funds.

(13) Bonds issued by the state board pursuant to this subsection (d) shall be payable primarily from said motor vehicle license taxes as provided herein, and if heretofore or hereafter authorized by law, may be additionally secured by pledging the full faith and credit of the state without an election. When heretofore or hereafter authorized by law, bonds issued pursuant to Article XII, Section 18 of the Constitution of 1885, as amended prior to 1968, and bonds issued pursuant to Article XII, Section 9, subsection (d) of the Constitution as revised in 1968, and bonds issued pursuant to this

subsection (d), may be refunded by the issuance of bonds additionally secured by the full faith and credit of the state only at a lower net average interest cost rate.

230.22 General powers of school board.—The school board, after considering recommendations submitted by the superintendent, shall exercise the following general powers:

* * * * *

(4) CONTRACT, SUE, AND BE SUED.—The school board shall constitute the contracting agent for the district school system. It may, when acting as a body, make contracts, also sue and be sued in the name of the school board; provided, that in any suit, a change in personnel of the school board shall not abate the suit, which shall proceed as if such change had not taken place.

* * * * *

235.002 Intent.—The intent of the Legislature is:

(1) To guarantee to each student in the Florida public school system the availability of an educational environment appropriate to his educational needs which is substantially equal to that available to any similar student, notwithstanding geographic differences and varying local economic factors.

(2) To utilize, as far as practicable, innovative designs, construction techniques, and financing mechanisms in building school facilities for the purpose of reducing costs, creating a more satisfactory educational environment, and reducing the amount of time necessary for design and construction to fill unmet needs.

(3) To provide a systematic mechanism whereby educational facilities construction plans can meet the current and projected needs of school populations as quickly as possible by building uniform, sound educational environments, removing the necessity of involuntary multiple daily sessions in elementary and secondary schools, and alleviating overcrowding and to provide a sound base for planning for educational facilities needs.

(4) To provide a systematic plan for educational construction in each school district whereby school sites may be acquired, educational requirements formulated, and architectural plans and specifications developed so as to proceed immediately with the construction of educational facilities when funds are made available.

* * * * *

235.012 Office of Educational Facilities Construction.—There is authorized and established an Office of Educational Facilities Construction, which shall be a part of the staff organization of the Commissioner of Education. For purposes of this chapter, the term "office" shall mean the "Office of Educational Facilities Construction." The office shall recommend to the state board rules, regulations, and procedures for the administration of its programs and activities as hereinafter provided. Support for the programs and activities of the office shall be included in the legislative budget request of the Commissioner of Education.

* * * * *

235.014 Functions of the office.—The functions of the office shall include, but not be limited to, the following:

(1) To require of the local school boards the development and submission of long-range plans for educational facilities construction.

(2) To require local school boards to submit plans for necessary improvements to existing schools within the district.

(3) To authorize and request, when there is a clear and present danger to life and safety, county and municipal governments, in cooperation with local school boards, to construct and maintain sidewalks or bicycle trails within a 2-mile radius of each school within the jurisdiction of the school board.

(4) To approve or disapprove, for reasons shown, each board's annual plan for educational facilities construction and its plans for specific projects.

(5) To require of the boards the submission of other data or information relevant to educational facilities construction or capital improvements.

(6) To require of each district, all agencies of the state, and other appropriate agencies complete and accurate financial data as to the amounts of funds from all sources that are available for educational facilities construction.

(7) To recommend to the State Board of Education rules and regulations defining approved capital expenditures which shall be paid by the state.

(8) To approve or disapprove, for reasons shown, the acquisition of sites by the boards and plans and specifications for new educational facilities construction or for the improvement of existing structures on sites as submitted.

(9) To present a report to the State Board of Education on the needs of educational facilities construction and a suggested level of funding for each fiscal year.

(10) To develop the mechanisms to be used in bidding specific projects.

(11) To recommend to the State Board of Education rules and regulations relating to the actual construction of educational facilities and improvements to existing structures or sites.

(12) To require analyses of locally available materials in relation to economy, ready availability, and speed of construction.

(13) To determine the roles of the different state and local government agencies, including planning commissions, in the planning, design, and construction of educational facilities and improvements to insure inclusion of services and programs for community centers that can appropriately be provided on a single site for the purpose of meeting current and future needs of the community to be served.

(14) To develop a mandatory, uniform building code for school construction and to promulgate appropriate administrative rules and regulations after the code is adopted by the State Board of Education.

(15) To insure as far as practicable that there be as much participation as possible by local personnel in its programs and activities, that local initiative be encouraged and utilized, and that the needs of local communities be given consideration when constructing new educational facilities or making additions or improvements to existing facilities in the community.

(16) To perform any other functions that may be involved in educational facilities construction which shall insure that the intent of the Legislature is implemented.

* * * * *

235.016 Duties and responsibilities of the associate commissioner.—The duties and responsibilities of the associate commissioner shall include, but not be limited to, the following:

(1) To recommend rules and regulations for the operation of the programs and activities of the office and to present them to the State Board of Education.

(2) To recommend for employment staff sufficient to carry out all the functions and responsibilities of the office as hereinafter provided.

(3) To organize the staff in the most efficient way to carry out the duties, responsibilities, programs, and

functions of the office effectively and to insure that the intent of the legislature is implemented.

(4) To submit to the commissioner an annual report on the projected needs of the school facilities construction for each fiscal year and to recommend a suggested level of funding to be presented by the commissioner to the State Board of Education.

(5) To review all requests for construction funds and to make recommendations to the commissioner concerning approval and funding.

(6) To perform such other functions as may be required of him by the commissioner, state board regulations, or law.

* * * * *

235.15 Survey required.—At least every 5 years each school board shall arrange for a survey of the district school system to aid in formulating a long-time program for the schools of the district. The report based on the survey shall show the location and condition of all school buildings, the location of pupils and the places where schools for the various grades should be maintained temporarily or permanently, and the utilization of school plants based on an extended school day or year-round operation, and shall include such other information as may be required under regulations of the state board. The school board may request assistance from the Department of Education in carrying on the survey or may utilize such other agency as may be approved under regulations of the state board. A copy

of each survey report shall be filed with the Department of Education.

235.16 School plant program based on survey. —The school board of any district in which a survey has been made, as provided in this chapter, shall, within 6 months after the completion of the survey, adopt and submit to the Department of Education a proposed school plant program for the schools of that district. This school plant program of the district shall, insofar as practicable, be based upon the findings and recommendations of the survey report, taking into consideration the school needs of the entire district. The program may be amended by resolutions adopted by the school board, provided copies of the resolutions with supporting evidence are filed with the Department of Education. The department shall cause a study to be made of the proposed program, or amendments thereto, for each district and shall submit to the school board its recommendations for improvements in the program.

235.18 Annual capital outlay program and budget. —Each school board shall, each year, adopt a proposed capital outlay program and budget for the ensuing year in order that the capital outlay needs of the district school system for the entire year may be well understood and, insofar as possible, provisions made for same. This capital outlay program and budget shall be a part of the annual school budget and shall be based upon and in harmony with the long-range school plant program previously filed with the Department of Education. This program shall designate and locate the capital outlay projects for the year, including new buildings, alterations and additions to be made. No public school fund shall be expended on any such project not included

in the budget as amended to date. If approved by the Department of Education, the program, as amended during the year with its approval, shall be executed as provided by law supplemented by rules and regulations of the state board.

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235.26 State Uniform Building Code for public school construction.—The office is directed to recommend to the state board for approval regulations prescribing a mandatory, uniform, statewide building code for the construction of public educational facilities. Wherever the words "Uniform Building Code" appear, they shall mean the "State Uniform Building Code for Public Educational Facilities Construction." It shall not be the intent of the Uniform Building Code to inhibit the use of new materials or innovative techniques; nor shall it specify or prohibit materials by brand names. The code shall be flexible enough to cover all phases of construction which will afford reasonable protection for public safety, health, and general welfare. The office may secure the service of other state agencies or such other assistance as it may find desirable in the formulation of the code.

(1) CONFORMITY TO UNIFORM BUILDING CODE STANDARDS REQUIRED FOR APPROVAL.—No superintendent shall recommend approval of, and no school board shall approve, any plans for the construction, erection, alteration, renovation, repair, or demolition of any educational facility in the district unless these plans conform to the requirements of the code promulgated by the office. It shall also be the responsibility of the office to develop, as a part of the State Uniform Building Code, necessary standards relating to:

(a) Prefabricated or factory-built facilities which are designed to be portable, relocatable, demountable, or reconstructible, are used primarily as classrooms, and do not fall under the provisions of ss. 320.821-320.832.

(b) The sanitation of educational facilities and the health of occupants of school plants.

(c) The safety of occupants of school plants and of educational facilities as provided in s. 235.06.

(d) The energy efficiency of all mechanical systems, including heating, air-conditioning, plumbing, ventilating, or electrical systems, and the energy efficiency of the overall design of the facility.

(2) ENFORCEMENT BY LOCAL SCHOOL BOARD.—It is the responsibility of each local school board to insure that all plans and facilities meet the standards of the Uniform Building Code and to provide for the enforcement of this code in the areas of their jurisdiction. Each school district is authorized to employ a chief building official or inspector and such other inspectors and personnel as may be necessary to administer and enforce the provisions of this code. School districts may also utilize local building department inspectors who are certified as provided herein to enforce this code. Inspectors shall show evidence of certification by the office as having met the requirements of the office for Uniform Building Code inspectors. Plans or facilities that fail to meet the standards of the Uniform Building Code shall not be approved.

(3) ENFORCEMENT BY OFFICE OF EDUCATIONAL FACILITIES CONSTRUCTION.—As

a further means of insuring that all educational facilities hereafter constructed or materially altered or added to conform to the Uniform Building Code standards, each school board which undertakes the construction, erection, alteration, renovation, repair, or leasing of any educational facility, the cost of which exceeds $25,000, shall see that the approval of the office is obtained as hereinafter provided, except that for any project involving construction of student instructional space, the minimum amount requiring approval as provided herein shall be $10,000. No public school funds may legally be expended for the construction, erection, alteration, renovation, repair, or leasing of any educational facility unless the provisions of this section are observed and until the district school board has received a written statement from the office within the time limits as provided in this section that approval for the project has been granted.

(4) OFFICE APPROVAL.—

(a) Before the contract has been let for any construction project, the district school board shall require the superintendent to submit to the office two copies each of:

1. Phase I documents to include:

a. Educational specifications; and

b. Schematic drawings and proposals.

2. Phase II documents to include:

a. Preliminary drawings and proposals; and

b. Preliminary specifications.

3. Phase III documents to include:

a. Completed contractual documents;

b. Energy efficiency studies; and

c. Life-cycle cost analyses.

The district school board shall not proceed with any proposed construction project until the written approval of the office is received. The office shall, in writing, approve, disapprove, make recommendations, or otherwise act on the phase documents submitted by a district within 30 calendar days of the official receipt of each set of phase documents by the office. If the district school board does not receive written notice within the time prescribed above, then it shall proceed as if written approval had been received. The office is empowered and directed to adopt regulations providing for exceptions to the steps required for approval for state board-approved prototype design criteria, reuse of previously approved district plans, and other plans and proposed minor renovations or construction projects which do not necessarily require detailed documentation and intense review by the office.

(b) In reviewing plans for approval, the office shall take into consideration:

1. The desirability and need for the new facility.

2. The educational planning.

3. The functional and architectural planning.

4. The location on the site.

5. Plans for future expansion.

6. The type of construction.

7. Sanitary provisions.

8. Conformity to Uniform Building Code standards.

9. The structural design and strength of materials proposed to be used.

10. The mechanical design of any heating, air conditioning, plumbing, ventilating, or electrical system.

11. The energy efficiency of the design.

12. Life-cycle cost considerations.

13. The construction of special facilities for handicapped children.

(5) STATE BOARD OF APPEALS.—The State Board of Education shall be the final board of appeals for all questions, disputes, or interpretations involving the Uniform Building Code, and any district school board shall prepare in writing its reasons for objecting to decisions made by Uniform Building Code inspectors or the office.

(6) ANNUAL REVIEW AND UPDATE; DISSEMINATION.—The office is authorized annually

to review, update, revise, and improve the Uniform Building Code. The office shall publish and make available at no cost one copy of the code and each amendment and revision thereto to each local school board and to each code enforcement agency in the state. The office shall make additional copies available to all interested persons at a price sufficient to recover costs.

(7) FALLOUT SHELTERS.—

(a) After the effective date of this act, the school board may require the architect concerned in the initial design, stages of design, and construction of new educational facilities to apply for technical advice and counsel on fallout shelter slanting and cost-reduction techniques available without cost through the Department of Community Affairs.

(b) When the school board concerned determines the application of fallout shelter slanting and cost-reduction techniques to be feasible and economical for the inclusion of a fallout shelter in the proposed educational facility, the design and construction of such educational facility may include fallout protection which meets the minimum standards for such protection as prescribed by the Department of Community Affairs.

(c) School authorities of the state and its political subdivisions are authorized to modify existing educational structures to incorporate fallout shelters, and the Department of Community Affairs shall make available to such authorities the same professional services as set forth in paragraph (a). Such authorities are further authorized to participate in such federal assistance

programs as may be available to assist local authorities in providing fallout protection in educational facilities.

(8) LEGAL EFFECT OF CODE.—The State Uniform Building Code for Public Educational Facilities Construction shall have the force and effect of law and shall supersede any other code adopted by a local school board or any other building code or ordinance for the construction of educational facilities, whether at the local, county, or state level, and whether adopted by administrative regulation or legislative enactment. All special acts or general laws of local application are hereby repealed to the extent that they conflict with this section.

(9) LOCAL LEGISLATION PROHIBITED.—After July 1, 1974, pursuant to s. 11(a)(21), Art. III of the State Constitution, there shall not be enacted any special act or general law of local application which proposes to amend, alter, or contravene any provisions of the State Building Code adopted under the authority of this section.

* * * * *

235.31 Advertising and awarding contracts for building or improvements.—

(1) As soon as practicable after any bond issue has been voted upon and authorized or funds have been made available for the construction, repair, alteration, or otherwise for the improvement of any education facility, and after plans for the work have been approved by the office, the public education authority, after advertising the same in the manner prescribed by law,

shall award the contract for such building or improvements to the lowest responsible bidder therefor; provided, that the school board may within its discretion reject any and all bids received if it deems the same expedient, and may readvertise, calling for new bids. For a project costing $50,000 or less, the public education authority may arrange for the building to be erected on a day labor basis.

* * * * *

235.32 Substance of contract; contractors to give bond; penalties.—Upon accepting a satisfactory bid, the school board shall enter into a contract with the party or parties whose bid has been accepted, and such contract shall contain the drawings and specifications of the work to be done or the material to be furnished, the time limit in which the construction is to be completed, the time and method by which payments are to be made upon said contract and the penalty to be paid by the contractor for any failure to comply with the terms of said contract. The contractor shall furnish the school board with a performance bond, issued by a surety company licensed to do business in Florida, for 100 percent of the contract price. The contractor shall also furnish a payment bond in accordance with s. 255.05, as a guaranty against the involvement of the school board in actions to obtain payment for materials, supplies or labor used directly or indirectly by contractor or subcontractors. The contractor and the contract shall be exempt from the requirements of s. 215.19, relating to the rate of payment for wages of laborers, mechanics, and apprentices. Notwithstanding any other provision of this section, if 25 percent or more of the costs of any construction project is paid out of a trust fund established

pursuant to 31 U.S.C. s. 1243(a)(1), laborers and mechanics employed by contractors or subcontractors on such construction projects will be paid wages not less than those prevailing on similar construction projects in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. Any and all persons, firms or corporations who shall construct any part of any school building or addition thereto on the basis of any unapproved plans or in violation of any plans approved in accordance with the provisions of this chapter and regulations of the office relating to school building standards or specifications shall be subject to forfeiture of his bond and unpaid compensation in an amount sufficient to reimburse the school board for any costs which will need to be incurred in making any changes necessary to assure that all requirements are met, and shall also be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, for each separate violation.

* * * * *

236.084 Funds for comprehensive school construction and debt service.—The annual allocation from the Florida Education Finance Program to each district for the comprehensive school construction and debt service program shall be determined as follows:

(1) Pursuant to regulations of the state board, the commissioner shall determine annually the projected school plant and annual debt service needs for each school district and report this to the Legislature. In determining these needs and in making the report the commissioner shall include at least the following elements:

(a) Projected student membership for the next 5-year period.

(b) Projected number of unhoused students.

(c) Cost of removing the deficiencies related to health and safety to life standards.

(d) Cost of improving the educational environment in existing school plants.

(e) Current construction cost data as determined by the state board.

(f) Five-year projected cost of amortizing the annual payment of the bonded indebtedness of the district incurred prior to July 1, 1973, and that part of the annual payment of the bonded indebtedness incurred subsequent to July 1, 1973, which services bond funds which were expended in meeting the projected plant need of the district, as determined by the commissioner in accordance with the formula provided in this section and other restrictions upon the allocation of state funds as provided by law.

(g) Cost of site acquisition and improvement.

(h) Amount of additional resources available pursuant to the provisions of s. 9(a)(2) and (d), Art. XII of the State Constitution as amended in 1974.

(i) Amount of funds from other sources available to the school board and earmarked for capital outlay purposes. However, funds available and earmarked for capital outlay purposes from the current tax levied on

nonexempt property by the district school board for operating expenses shall not be considered in determining the unmet need until the school board encumbers or expends such funds.

(j) District housing index.

(k) Square footage requirements for program grade groups.

(l) Special instructional facilities needed to improve the program at a school center, but not necessarily to increase the student stations of the center.

(m) Amount of funds derived from voted ad valorem taxes in excess of 10 mills which were expended for school construction projects which would have been funded by the state under provisions of this section during the 5 years immediately prior to the beginning of each fiscal year, except that those funds utilized for payment on bonded indebtedness shall not be included in the calculations required by this subsection.

(n) Relocatables provided under s. 235.211 shall be included in the district inventory of school facilities, but shall only be rated at one-half of actual pupil capacity for purposes of the inventory and future needs determination.

(2) The commissioner shall determine annually the amount allocated to each district from the funds appropriated for the purpose of implementing this section as follows:

(a) Determine the costs of the projected school plant needs, the 5-year projected debt service needs, and the expenditures of ad valorem taxes in excess of 10 mills for each district, as determined in subsection (1).

(b) Determine the projected additional resources available under the provisions of s. 9(d), Art. XII of the State Constitution as amended in 1972, and the projected amount available to each district from other fund sources allocated for school plants.

(c) From the costs of the projected school plant and 5-year projected debt service needs for each district subtract the projected additional resources available and add the expenditure of ad valorem taxes in excess of 10 mills, as determined in paragraph (a). The result shall represent the estimated cost of unfunded school plant and debt service needs for each district.

(d) The funds appropriated annually for the purpose of implementing this section shall be allocated to the respective districts in proportion to their percentage of the state total of unfunded school plant and debt service needs as determined above for the fiscal year immediately preceding the fiscal year for which the funds are appropriated.

(3) Funds accruing to a district from the provisions of this section shall be expended on needed projects as shown by a survey or surveys in the district under regulations of the state board. The priority of expenditure by districts shall be as follows:

(a) New classrooms and special instructional facilities necessary to provide needed student stations at either a new or existing school center in order to alleviate overcrowding and to eliminate multiple daily sessions or to provide needed student stations as determined by student population projections and the district school plant survey; school sites or additions to sites and site improvement, incident to new construction or to make a site addition usable; restoration and correction as required by s. 235.06 of deficiencies which produce an unsafe, unhealthy, or unsanitary environment for occupants of school facilities, except that, based upon the need as determined by the commissioner in the formula calculations, up to one-tenth of a district's annual allocation shall be expended on restoration and correction of such deficiencies. In addition, up to two-tenths of a district's annual allocation may be expended on facilities or projects as described in paragraph (b) which are recommended in the latest district school plant survey.

(b) Special instructional and auxiliary facilities needed to improve the program at a school center, but not necessary to increase the student stations; major alterations to existing buildings which would substantially improve the utility of the space; or replacement of, or major alterations to, the existing heating, cooling, lighting, and sanitary facilities at a permanent school center.

(c) Debt service for district bonds serviced by voted ad valorem taxes.

(4) Each school board allocated funds under this section shall submit to the commissioner a projection of its schedule of eligible capital outlay disbursements

for specified periods, as prescribed by regulations of the state board. Upon approval by the commissioner, the comptroller shall disburse the funds. Prior to the distribution of the initial funds pursuant to this section the commissioner shall determine the district's needs pursuant to paragraphs (2)(a), (b) and (c) and update the state facilities inventory subsequent to the effective date of this act.

(5) Funds accruing to a district from the provisions of this section shall only be expended on construction projects that utilize state board-approved prototype design criteria as provided by law or that utilize district plans previously approved by the department and used by the district which conform to the standards of the [Uniform Building Code for Public Educational Facilities Construction] and have not been substantially or materially altered since approval was granted by the department.

(6) In the event that a change, correction, or recomputation of data during any year, including the 1973-1974 fiscal year, results in a reduction or increase of the calculated amount previously allocated to a school district, the allocation to that district shall be adjusted correspondingly.

(a) If such recomputation results in a reduction of the calculated amount, any unencumbered portion of the excess allocation shall be returned to the department for reallocation to eligible districts in the next fiscal year. Any encumbered portion of the excess allocation shall be carried forward and deducted from future entitlements to the district until the excess allocation is returned in total.

(b) If such recomputation results in an increase of the calculated amount, such additional amount shall be added to the allocation to the district from future appropriations.

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287.055 Acquisition of professional architectural, engineering, landscape architectural, or land-surveying services; definitions; procedures; contingent fees prohibited; penalties.—

(1) SHORT TITLE.—This section shall be known as the "Consultants' Competitive Negotiation Act."

(2) DEFINITIONS.—For purposes of this section:

(a) "Professional services" shall mean those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered land surveying, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered land surveyor in connection with his professional employment or practice.

(b) "Agency" means the state or a state agency, municipality, or political subdivision, a school district or a school board.

(c) "Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice architecture, engineering, or land surveying in the state.

(d) "Compensation" means the total amount paid by the agency for professional services.

(e) "Agency official" means any elected or appointed officeholder, employee, consultant, person in the category of other personal service or any other person receiving compensation from the state, a state agency, municipality, or political subdivision, a school district or a school board.

(f) "Project" means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency pursuant to paragraph (3)(a). An agency shall prescribe by administrative rule procedures for the determination of a project under its jurisdiction. Such procedures may include:

1. Determination of a project which constitutes a grouping of minor construction, rehabilitation, or renovation activities.

2. Determination of a project which constitutes a grouping of substantially similar construction, rehabilitation, or renovation activities.

(g) A "continuing contract" is a contract for professional services entered into in accordance with all the procedures of this act between an agency and a firm whereby the firm provides professional services to the agency for work of a specified nature as outlined in the contract required by the agency with no time limitation except that the contract shall provide a termination clause.

(3) PUBLIC ANNOUNCEMENT AND QUALIFICATION PROCEDURES.–

(a) Each agency shall publicly announce, in a uniform and consistent manner, each occasion when professional services are required to be purchased for a project whose basic construction cost is estimated by the agency to be more than $100,000 or for a planning or study activity when the fee for professional services exceeds $5,000, except in cases of valid public emergencies so certified by the agency head. Public notice shall include a general description of the project and shall indicate how interested consultants can apply for consideration.

(b) Each agency shall encourage firms engaged in the lawful practice of their profession who desire to provide professional services to the agency to submit annually a statement of qualifications and performance data.

(c) Any firm or individual desiring to provide professional services to the agency must first be certified by the agency as qualified pursuant to law and the regulations of the agency. The agency shall make a finding that the firm or individual to be employed is fully qualified to render the required service. Among the factors to be considered in making this finding are the capabilities, adequacy of personnel, past record, and experience of the firm or individual.

(d) Each agency shall adopt administrative procedures for the evaluation of professional services, including, but not limited to, capabilities, adequacy of personnel, past record and experience, and such other

factors as may be determined by the agency to be applicable to its particular requirements.

(e) The public shall not be excluded from the proceedings under this section.

(4) COMPETITIVE SELECTION.—

(a) For each proposed project, the agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with, and may require public presentations by, no less than three firms, regarding their qualifications, approach to the project, and ability to furnish the required service.

(b) The agency shall select, in order of preference, no less than three firms deemed to be most highly qualified to perform the required services after considering such factors as the ability of professional personnel, past performance, willingness to meet time and budget requirements, location, recent, current, and projected work loads of the firms, and the volume of work previously awarded to the firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

(c) This subsection shall not apply to a professional service contract for a project whose basic construction cost is estimated by the agency to be $100,000 or less or for a planning or study activity when the fee for professional services is $5,000 or less.

(d) Nothing in this act shall be construed to prohibit continuing contracts between firm and agency.

(5) COMPETITIVE NEGOTIATION.—

(a) The agency shall negotiate a contract with the most qualified firm for professional services at compensation which the agency determines is fair, competitive, and reasonable. In making such determination the agency shall conduct a detailed analysis of the cost of the professional services required in addition to considering their scope and complexity. For all lump-sum or cost-plus-a-fixed-fee professional service contracts over $50,000, the agency shall require the firm receiving the award to execute a truth-in-negotiation certificate stating that wage rates and other factual unit costs supporting the compensation are accurate, complete, and current at the time of contracting. Any professional service contract under which such a certificate is required shall contain a provision that the original contract price and any additions thereto shall be adjusted to exclude any significant sums [by which] the agency determines the contract price was increased due to inaccurate, incomplete, or noncurrent wage rates and other factual unit costs. All such contract adjustments shall be made within 1 year following the end of the contract.

(b) Should the agency be unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the agency determines to be fair, competitive, and reasonable, negotiations with that firm shall be formally terminated. The agency shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency shall terminate negotiations.

The agency shall then undertake negotiations with the third most qualified firm.

(c) Should the agency be unable to negotiate a satisfactory contract with any of the selected firms, the agency shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this subsection until an agreement is reached.

(6) PROHIBITION AGAINST CONTINGENT FEES.—

(a) Each contract entered into by the agency for professional services shall contain a prohibition against contingent fees as follows: "The architect (or registered land surveyor or professional engineer, as applicable) warrants that he has not employed or retained any company or person, other than a bona fide employee working solely for the architect (or registered land surveyor, or professional engineer, as applicable) to solicit or secure this agreement and that he has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the architect (or registered land surveyor or professional engineer, as applicable) any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award or making of this agreement." For the breach or violation of this provision, the agency shall have the right to terminate the agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.

(b) Any individual, corporation, partnership, firm, or company, other than a bona fide employee working solely for an architect, professional engineer, or registered land surveyor, who offers, agrees, or contracts to solicit or secure agency contracts for professional services for any other individual, company, corporation, partnership, or firm, and to be paid, or is paid, any fee, commission, percentage, gift, or any other consideration contingent upon, or resulting from, the award or the making of a contract for professional services shall, upon conviction in a competent court of this state, be found guilty of a first degree misdemeanor punishable as provided in s. 775.082 or s. 775.083.

(c) Any architect, professional engineer, or registered land surveyor, or any group association, company, corporation, firm, or partnership thereof, who shall offer to pay, or pay, any fee, commission, percentage, gift, or other consideration contingent upon, or resulting from, the award or making of any agency contract for professional services, shall, upon conviction in a state court of competent authority, be found guilty of a first degree misdemeanor punishable as provided in s. 775.082 or s. 775.083.

(d) Any agency official who offers to solicit or secure, or solicits or secures, a contract for professional services and to be paid, or is paid, any fee, commission, percentage, gift, or any other consideration contingent upon the award or making of such a contract for professional services between the agency and any individual person, company, firm, partnership or corporation shall, upon conviction by a court of competent authority, be found guilty of a first degree misdemeanor punishable as provided in s. 775.082 or s. 775.083.

(7) STATE ASSISTANCE TO LOCAL AGENCIES. —On professional service contracts [for which] the fee is over $25,000, the Department of Transportation or the Department of General Services shall provide, upon request by a municipality, political subdivision, school board, or school district, and upon reimbursement of the costs involved, assistance in selecting consultants and in negotiating consultant contracts.

(8) APPLICABILITY TO EXISTING CONTRACTS.—Nothing in this section shall affect the validity or effect of any contracts in existence on July 1, 1973.

(9) Notwithstanding any other provision of this section, there shall be no public notice requirement or utilization of the selection process as provided in this section for projects in which the agency is able to reuse existing plans from a prior project. However, subsequent to July 1, 1975, public notice for any plans which are intended to be reused at some future time shall contain a statement which provides that the plans are subject to reuse in accordance with the provisions of this subsection.

(10) Nothing in the amendment of this section by ch. 75-281, Laws of Florida, is intended to supersede the provisions of ss. 235.211 and 235.31.

* * * * *

6A-2.24 Inspection by the office of new construction and release of final payment by the board.

(1) All new construction, for which plans were required to be approved by the office, constructed from any fund source, and plans exempt by Rule 6A-2.11(1)(a) and (3), FAC, from approval by the office but were constructed in whole or part from state funds, shall be inspected by a representative of the office for the purpose of ensuring that the completed new construction conforms to approved contractual documents or applicable laws and rules. This inspection shall occur only after the board has inspected and accepted completed new construction. The board shall withhold its final payment to the contractor until a certificate of final inspection (CFI) is issued by the office in accord with Rule 6A-2.24(2), FAC. For construction projects not requiring a final inspection by the office, see Rule 6A-2.24(5), FAC.

(2) The request for final inspection shall be filed in duplicate with the office. It shall not be executed by the office until:

(a) A certificate is received from the board, certified by the project architect that all work has been substantially completed in accordance with approved contractual documents and bearing the date of acceptance of the project by the board.

(b) The completed work has been inspected by a representative of the office and found to be in accordance

with approved contractual documents or applicable laws and rules.

* * * * *

(4) In cases where completed construction fails to conform to approved contractual documents or where final inspection reveals violations not previously noted, the representative of the office shall notify the administrator and project architect of non-conformance and request compliance. Failure to comply with minimum requirements of statutes, the UBC, and the mandatory requirement of the representative of the office shall mean that any partial payment of state funds for such deficient construction is an improper expenditure of funds and shall constitute sufficient cause for withholding future state capital outlay funds until the board has corrected the deficiencies or reimbursed state capital outlay funds in full for the improper expenditure.

* * * * *

(9) The effective completion date of a construction project requiring approval of the office is the date on which the office issues the certificate of final inspection. The effective completion date of a construction project not requiring approval of the office is the date on which the board officially accepts the project.

(10) The allowed date of occupancy of the school facility shall be indicated on the certificate of final inspection.

* * * * *

PART IV

CAPITAL OUTLAY AND DEBT SERVICE FUNDS

6A-2.201 Commissioner to administer capital outlay programs. The commissioner shall be the agent of the State Board for the administration of all capital outlay programs authorized by law, including those programs funded in whole or in part from the proceeds of bonds of the State Board issued pursuant to law.

(1) The commissioner is authorized to establish administrative units in the department for the purpose of carrying out all duties and responsibilities of administering the capital outlay programs. The office is designated as the administrative unit to administer the capital outlay programs for all levels of education.

(2) The commissioner is authorized to use the services of the state board of administration, the attorney general's office, or any other state agency, in accordance with cooperative agreements which may be entered into with such agencies with the approval of the State Board, and further, to use, insofar as is practicable, the clerical assistance and other services of the office of the state comptroller and the office of the state treasurer in the administration of the capital outlay programs.

6A-2.202 All capital outlay funds to be administered alike.

(1) All funds accruing to or benefiting a board under Section 9(d), Article XII of the State Constitution, including current CO&DS funds and the proceed of

State Board bonds and the proceeds of special tax school district bonds, or other loans, intended to be serviced at any time from funds accruing under Section 9(d), Article XII of the State Constitution, shall be administered and expended in conformance with the provisions of State Board rules and applicable laws relating to capital outlay expenditures and construction of educational plants.

* * * * *

6A-2.203 Reimbursement of funds improperly expended. If any funds accruing to or benefiting a board under Section 9(d), Article XII of the State Constitution, whether current capital outlay and debt service funds or the proceeds of bonds or loans serviced by CO&DS funds, or any funds benefiting a board including the BOR under Section 9(a)(2), Article XII of the Constitution, as amended, be expended in violation of the provisions of said Sections 9(d) or 9(a)(2), Article XII, or of any applicable statute or rule affecting the purpose or use of such funds, the board shall arrange to make reimbursement from funds exclusive of funds derived from Sections 9(d) and 9(a)(2). Article XII, State Constitution, not later than the next succeeding budget year. If the board fails to make such reimbursement, the commissioner shall so notify the state comptroller, who shall thereafter withhold any funds due the board from the under any provision of law until evidence has been submitted to the commissioner and the state comptroller that the reimbursement has been made.

* * * * *

6A-2.206 Establishing order of priorities for expenditure of funds. In determining priorities of projects on which funds authorized by Sections 9(a)(2) and 9(d), Article XII, State Constitution and proceeds of loans or bond issues serviced by these funds may be expended, needs shall be met by a board in the following order and no project shall be eligible for expenditure of such funds until all needs in the higher priorities have been satisfied, except as prescribed herein and in Rule 6A-2.207, FAC. Only projects recommended on the basis of an educational plant survey shall be eligible for expenditure of such funds.

(1) Priorities for capital outlay projects:

(a) Priority A. Instructional facilities, and equipment necessary to provide needed student stations at either a new or existing educational facility; sites or additions to sites; site improvement incident to new construction or to make a site addition usable; remodeling and renovating of existing buildings which would substantially improve the utility of the space; replacement or remodeling of the existing heating, cooling, or lighting facilities of an educational facility that is recommended on the basis of a survey for continued use; restoration equal to previous condition, to the extent not covered by insurance, of educational facilities damaged by fire, storm, or other providential causes; replacement of roof and roofing membranes; and correcting deficiencies, as identified in Section B, Chapter 6A-2, FAC, required for safety to life, health, and sanitation.

* * * * *

6A-2.207 Establishment of priorities of capital outlay projects. Priorities of projects shall be established before a board requests funds derived from Section 9(a)(2) and (d), Article XII, State Constitution, or before it proposes to expend these funds. The priority of needs and of projects shall be established by the following procedure:

(1) The board shall formulate a proposed building program to be paid from funds derived from Section 9(a)(2) and (d), Article XII, State Constitution. This proposed building program shall be based on the current educational plant survey made under the rules of the State Board and shall list the projects in the order of priority of need as determined on the basis of the survey and State Board rules and law. This building program shall be set forth in a project priority list in such form as may be prescribed by the commissioner.

(2) The office shall verify that the building program and the priority of projects conform to the provisions of the Constitution, law and State Board rules, and, if so, shall submit the list to the State Board for approval. If the proposed building program and priorities of projects do not conform the board shall be notified, giving reasons and suggestions for making necessary changes. When approved by the State Board, this building program and list of priorities shall be followed in setting up projects for the issuance of bonds and in carrying on a building program on a "pay-as-you-go basis."

* * * * *

6A-2.210 Procedure for handling State Board bond proceeds.

(1) The proceeds of the sale of original bonds or motor vehicle tax anticipation certificates issued under Section 9(d), Article XII, State Constitution shall be made only when a voucher requesting such of the particular construction or project account for which said original bonds or original certificates were issued as designated in the district's resolution requesting and the State Board's resolution authorizing the issuance of such bonds.

(2) Withdrawals of State Board bond proceeds shall be made only when a voucher requesting such warrants is submitted by the board in whose behalf the bonds are issued, certified to the effect that such withdrawals are proper expenditures for the cost of the particular construction or project account against which the requested warrant is to be drawn.

(3) A board may requisition by voucher the funds for any or all construction, or project accounts at any time after the proceeds of any sale of original bonds or original certificates have been deposited in the state treasury. Such funds shall be deposited, budgeted, expended and accounted for by the board as provided by law and State Board rules for these funds and for all other bond construction funds.

* * * * *

6A-2.212 State Board bond proceeds to be expended only as authorized in resolution. Proceeds of State Board bonds may be expended by a board only for the proper costs of the projects designated in the resolutions requesting and authorizing the issuance of the bonds, provided that, if the board finds that subsequent to

validation of bonds it is necessary and desirable to change the projects for which the bonds were requested to be issued in order to meet more pressing needs, the board may by formal resolution request the State Board to amend and the State Board may by resolution amend the list of projects for which the bonds were proposed to be issued, and the proceeds may then be expended in accordance with the amended list of projects.

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NO. 81-2271

in the

Supreme Court

of the

United States

October Term 1981

THE SCHOOL BOARD OF DADE COUNTY, FLORIDA
a public corporation under the laws of
the State of Florida,

Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals,
Eleventh Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Travelers objects to certain portions of the Statement of the Case as set forth by School Board primarily because it contains a number of conclusions of law, which are, of course, self-serving and not accurate statements of the underlying facts. Succinctly, the facts are as follows:

The case concerns itself with the construction of a Senior High School in Dade County, Florida. The School Board advertised for bids, and based upon those bids let a Contract for construction of that High School to International Builders of Florida, Inc., a general contractor. The Contract was in the amount of Six Million One Hundred Sixty Two Thousand ($6,162,000.00) Dollars, and Travelers issued a Performance and Payment Bond on the Project for the General Contractor, International Builders of Florida, Inc., with the School Board being the Obligee on the Bond.

During the course of construction, International Builders of Florida, Inc., defaulted on its contractual obligations and Travelers was called upon to complete the construction of the High School, which it did utilizing a different independent general contractor. During the time when Travelers was completing the Contract, delays occurred. The Travelers asserted that the delays were the fault of the Owner and its representative, the Architect. Upon completion of the Project, Travelers made claim for additional compensation and extensions of time arising from those delays. Compensation was asked in the amount of One Hundred Thirty Nine Thousand Two Hundred Fifty Four ($139,254.00) Dollars, based upon additional expenses, supervision and overhead

required because of the Owner-caused delay. (R-271-272.) Time extensions were granted, but the claim for additional compensation was denied by the School Board.

Travelers filed suit for the additional compensation in the Federal Court for the Southern District of Florida, with the claim being asserted in alternative causes of action in both contract and tort. (R-1-5.) Jurisdiction was based on Title 28, U.S.C. §1332, being a controversy in excess of Ten Thousand ($10,000.00) Dollars between parties of diverse citizenship. School Board filed its Answer and raised several Affirmative Defenses, one of which was lack of jurisdiction of the Federal Court by virtue of application of the Eleventh Amendment to the United States Constitution. (R-33-36.) The School Board moved for a Summary Judgment based on that Affirmative Defense and filed a supporting Affidavit. (R-233-250.) After argument of the Motion and deliberation, the Court entered its Order dismissing Travelers' cause of action for want of jurisdiction of the subject matter. (R-295-296.) Travelers filed an appeal to the Eleventh Circuit Court of Appeals, which entered its decision on January 22, 1982, reversing the Trial Court's Summary Judgment and remanding the cause. *Travelers Indemnity Co. v. School Board of Dade County*, 666 F.2d 505 (11th Cir. 1982). The School Board moved for a rehearing, which was denied by Order of March 12, 1982.

School Board petitioned for Writ of Certiorari, seeking to review the decision of the Court of Appeals, Eleventh Circuit, dated January 22, 1982.

SUMMARY OF ARGUMENT

Travelers argues that Petition for Writ of Certiorari filed by the School Board should not be granted. School Board has not shown the existence of any of the traditional grounds permitting the issuance of the Writ by the Supreme Court.

The School Board seeks but is unable to establish two grounds for its Petition for the Writ. Those grounds are that the Court of Appeals decided a Federal question not previously decided by the Supreme Court, and that the Court of Appeals reached a decision inconsistent with the applicable decisions of the Supreme Court. The decision below does not meet either of those criteria upon which to predicate a Petition for Writ of Certiorari.

ARGUMENT ON OBJECTION TO JURISDICTION

OBJECTION TO JURISDICTION OF THE COURT AND OPPOSITION TO PETITION FOR WRIT

The School Board fails to establish any right or privilege to have a Writ of Certiorari issue in this cause. Under Supreme Court Rules as to jurisdiction on Writ of Certiorari (Title 28, U.S.C., Supreme Court of the United States, Revised Rules No. 17) a review on a Writ of Certiorari is not a matter of right. It is a matter of discretion for which the Rules lay out certain indications as to the type of reasons to be considered by the Court.

The School Board seeks to utilize two suggested grounds under Rule 17 to permit a discretionary review on Writ of Certiorari. Those grounds are:

(1) That the decision of the Eleventh Circuit decided an important question of Federal law not settled by the Supreme Court, and which should be settled by this Court.

(2) That the decision of the Eleventh Circuit decided a Federal question in a manner conflicting with the decisions of the Supreme Court.

It is noted that the School Board's two asserted grounds for issuance of the Writ are inconsistent. The matter at issue has either been decided or not by this Court. If it has been decided then the School Board's first ground is insufficient. If it has not been decided, then the School Board's second ground is non-existent.

In fact, neither of the School Board's contentions are correct.

First, the School Board asserts that an important question of Federal Law is unresolved and ought to be resolved by this Court. That argument fails on two grounds. Initially, the School Board makes no attempt to show why the matter is of great importance. It merely asserts that it is of great importance. The real issue has nothing to do with the State's protection under the Eleventh Amendment to the United States Constitution. The real issue is whether contracting parties ought to be allowed to seek redress for damages against one another in a Court of law of the United States when the jurisdictional requirements of Title 28, U.S.C., §1332 have been met. The School Board seeks protection under the aegis of the Eleventh Amendment in a most artificial fashion. It strains logic to reach the School Board's conclusion. That this question is an important question in Federal Law is extremely doubtful.

Secondly and more importantly, the Court is not presented with an issue here that has not previously been decided by the Supreme Court. This Court has put the issue snugly to bed with its opinion in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273, 50 L.Ed.2d 471, 97 S.Ct. 568. The issue has been decided. School boards, like municipalities, are not alter egos of the State. They cannot claim protection under the Eleventh Amendment of the United States Constitution.

Mt. Healthy dealt with the School Board in the State of Ohio. They sought immunity under the Eleventh Amendment also. The factual situation was very analogous to the one in the case at bar. The following language by Mr. Justice Rehnquist in the *Mt. Healthy* decision is of interest here:

> Petitioner [School Board] is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev. Code Ann. §3301.07 (Page 1972 and Supp. 1975), and receives a significant amount of money from the State. Ohio Rev. Code Ann. §3317 (Page 1972 and Supp. 1975). But local school boards have extensive powers to issue bonds, Ohio Rev. Code Ann. §133.27 (Page 1969), and to levy taxes within certain restrictions of state law. Ohio Rev. Code Ann. §§ 5705.02, 5705.03, 5705.192, 5705.194 (Page 1973 and Supp. 1975). On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.
> 492 U.S. at 280, 291, 97 S.Ct. at 572, 573.

It is simply not true that the issue before this Court has not been decided. Not only was it decided in *Mt. Healthy*, it was decided most explicitly with respect to school boards in the State of Florida (as is the case here). In the case of *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976), the Fifth

Circuit, addressing the issue of Florida school boards and the Eleventh Amendment said:

> Our analysis of the nature of Florida school board is the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment.
> 534 F.2d at 656.

The issue has previously been decided by both this Court and the Fifth Circuit Court of Appeals and the issue has been decided in favor of The Travelers' position taken in the case now under consideration. There is no important question of Federal Law undecided by this Court.

The School Board says in its Petition for Writ of Certiorari that the Court of Appeals below decided two important questions of Federal Law which had not been, but should be, settled by this Court. That is not true. No new question of Federal Law was decided by the Court of Appeals. What the Circuit Court below *did* do was to distinguish this case from *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974). The *Edelman* case is heavily relied upon by the School Board, nearly to the exclusion of other authority. The reliance is misplaced, as the Circuit Court of Appeals points out when it elaborates on the distinctions between this case and the *Edelman* case. The first distinction is that the present case is not based upon breach of legal duty by a State official. In Edelman, it clearly was the conduct of a State official that was in issue. The School Board simply cannot escape that distinction.

The second distinction that the Court below makes with respect to the *Edelman* case is that Eleventh Amendment protection is available only if the Satisfaction of the Judgment is to be paid out of State funds under all circumstances. The Court of appeals rightly found that the record did not reflect that to be the case here. That is not even the contention of the School Board. It acknowledges that it has independent available funds. (R. Vol. III, page 9.) The School Board well knows that the monies to satisfy this Judgment, if obtained, need not necessarily come from "State funds". The School Board wants to reach that conclusion, in fact needs to reach that conclusion, to invoke the protection that it seeks but does not deserve.

In conclusion on this point, the Court below did not decide new issues as to important questions of Federal Law which had not been decided by the Supreme Court. It did make valid distinctions between this case and the *Edelman* case upon which the School Board needs to but cannot rely.

The other ground upon which School Board bases its Petition for Writ of Certiorari is that the Eleventh Circuit Court of Appeals below decided a Federal question in conflict with the decisions of this Court. Once again, School Board relies on *Edelman* to support this proposition. The Circuit Court's decision in *Travelers Indemnity Co. v. School Board of Dade County, supra,* is not contrary to or inconsistent with the decision in *Edelman v. Jordan, supra.* As previously stated, the Circuit Court distinguished *Edelman* on valid grounds. Also, Travelers points out that *Edelman* itself recognizes rather clearly that a county and its governing bodies are not a State for the purposes of the Eleventh

Amendment. The *Edelman* decision by way of footnote points out that bodies such as school boards can be subjected to the constitutional constraints of the Fourteenth Amendment, and at the same time not qualify as the "State" in an attempt to invoke Eleventh Amendment protection. The Court said in part:

> . . . a county does not occupy the same position as a State for purposes of the Eleventh Amendment. (Cites omitted.) The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for the purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for the purposes of the Eleventh Amendment. 415 U.S. at 668, Footnote 12, 94 S.Ct. at 1358, Footnote 12.

The decision of the Eleventh Circuit in *Travelers Indemnity Co. v. School Board of Dade County*, below, is not inconsistent with *Edelman*. It is, in fact, consistent with the premises laid down in *Edelman*. In *Edelman* the Court found for invoking protection of the Eleventh Amendment. In *Travelers Indemnity Co. v. School Board of Dade County* the Court below found against invoking Eleventh Amendment protection. This does not make the decisions inconsistent. The circumstances are not the same. There are distinctions to be made. The Circuit Court below made those distinctions, and properly so.

There are no reasonable grounds for invoking the Certiorari jurisdiction of the Supreme Court of the United States in this case. The decision below did not involve issues which concerned important Federal questions unresolved before this Court and the decision below did not decide a Federal question in a manner conflicting with the applicable decisions of this Court.

The School Board in its Brief charges that the Court below is plowing metaphoric furrows in a virgin field. Not so. This land has been plowed and borne fruit, which the School Board finds bitter to the taste.

CONCLUSION

The School Board's Petition for a Writ of Certiorari should be denied. There are no special and important reasons for granting such a Petition, and the School Board has not demonstrated that it meets any of the ordinary criteria to be considered by this Court in the exercise of its discretionary power to grant Petitions for Writs of Certiorari. The decision of the Eleventh Circuit Court of Appeals should be sustained and the Petition for Writ of Certiorari denied.

Respectfully submitted

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